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No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

FRANK C. HILL,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Stephen D. Miller
Counsel of Record
George W. Buehler
Gina T. Saviola
Robert B. Humphreys
HOWREY & SIMON
550 South Hope Street, Suite 1400
Los Angeles, California 90071
(213) 892-1800

Attorneys for Petitioner
Frank C. Hill

43 pp

QUESTIONS PRESENTED

I. Is the federal government forbidden by the Tenth Amendment, the Guarantee Clause, and principles of federalism, from manipulating state governments during undercover investigations?

II. Has a public official made an "explicit" agreement to perform official acts in exchange for money in violation of the Hobbs Act, when the alleged agreement is proved only by circumstantial evidence that is consistent with innocence as well as guilt?

PARTIES TO THE PROCEEDING

The parties in the court below were Frank C. Hill and Terry Frost, defendants-appellants, and the United States of America, appellee.

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PETITION FOR A WRIT OF CERTIORARI

Frank Hill petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unpublished and is set forth in the Appendix, at App-1a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 27, 1995. This Court has jurisdiction to review the judgment of the Court of Appeals, pursuant to 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Guarantee Clause of the United States Constitution, art. IV, § 4, provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

The Tenth Amendment of the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Hobbs Act, codified at 18 U.S.C. § 1951 (1994), provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined [not more than $10,000] or imprisoned not more than twenty years, or both.
>
> (b) As used in this section --
>
> . . . .

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT OF THE CASE

In 1986, the Federal Bureau of Investigation began an undercover operation to investigate suspected corruption in the California state legislature. The FBI's plan was to introduce a bogus bill into the legislature and approach various state legislators, offering to pay contributions for their support. The bogus bill would have made an out-of-state shrimp company eligible for state-guaranteed loans, providing it with the financing to construct a shrimp-processing plant near Sacramento. FBI agents and informants posed as representatives of the company.

In the first phase of the operation, after lobbying by undercover agents, Assemblywoman Gwen Moore unwittingly agreed to author the bill and introduce it into the state Assembly. Legislative staff for both the Democratic and Republican caucuses routinely analyzed the bill and recommended that legislators support it. After it was amended slightly in committee to accommodate concerns that it benefited only one company, the bill was passed almost unanimously by both houses of the California legislature.

Petitioner Frank C. Hill was a California State Assemblyman at the time, representing the 52nd District in the California Assembly. He was a moderate Republican who favored reducing government bureaucracy and encouraging job creation in California. Hill voted for the bill because it comported with his pro-business philosophy. Hill did not receive any contribution in connection with his support of the 1986 bill nor was he involved in this phase of the undercover operation.

Before the Governor signed the bill into law, he was secretly approached by FBI agents who informed him that it was a bogus bill and asked him to veto it. The Governor did as he was asked, but lied to the legislature, attributing his veto to the special interest nature of the bill.

The second phase of the sting began in 1988. The FBI caused its bill, now known as AB 4203, to be reintroduced into the Assembly. The government induced John Shahabian, a Senate legislative aide, to wear a wire to secretly record conversations. Shahabian had been caught in the first phase of the sting operation brokering a bribe for State Senator Paul Carpenter. His criminal acts were kept secret, and he continued his work for the state Senate while simultaneously acting as a federal informant.

Shahabian made contact with Karin Watson, a special assistant to Pat Nolan, the Republican Assembly Minority Leader. He had numerous secretly recorded conversations with Watson in which he conveyed that the shrimp company's president, an undercover agent using the name George Miller, would make contributions to Republicans if they would support the bill and help make sure the Republican Governor signed it.

Watson became the government's chief witness at trial, testifying under a plea agreement entered on November 28, 1989. Under the agreement, Watson pled guilty to one count of extortion under color of official right (18 U.S.C. § 1951), and the government agreed to recommend leniency if she testified truthfully. She had not yet been sentenced at the time of Hill's trial.

Watson testified that she spoke to Nolan about the bill, and that Nolan subsequently advised her that he had discussed it with Hill. According to Watson, Nolan advised her that he had reminded Hill that the Governor had vetoed AB 3773 in 1986, and had asked Hill "to shepherd the bill, to ride shotgun to make sure it all happens" and to have his

name added as a co-author. There was no evidence that Nolan ever discussed the subject of contributions with Hill.[1] Based only on this discussion, Hill agreed to lend his assistance.

On or about May 3, 1988, Watson provided Hill with a staff analysis of AB 4203, which strongly endorsed the bill and recommended support for it. At trial, Watson provided the following summary of her discussion with Hill:

> A. I asked him [Hill] if he would be a co-author on the bill, and that that was something that Pat [Nolan] had wanted him to be. And he said that he would be happy to do that.
>
> Q. Okay. Did you discuss the contributions that Terry Frost had told you about in connection with this bill?
>
> A. Yes, I did. I told him that we were going to be receiving $10,000 in contributions to the Republicans as a result of our help on the bill. . . .
>
> Q. And what was Defendant Hill's response?
>
> A. He was delighted.

Watson did not discuss the matter with Hill again until almost a month later, on May 26, 1988. Watson brought Miller (the agent posing as president of the shrimp company) by Hill's office in the Capitol and introduced him. Hill and his staff were rushing to catch a plane, and the meeting was short. Hill joked, "Is this the shrimp deal we're

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[1] The government introduced no evidence that Nolan discussed the subject of money with Hill, though its cooperating witness, Karin Watson, described their conversations in some detail.

trying to take care all this big boondoggle for you?" Miller explained the merits of his bill to Hill: "[its] good for California . . . [i]ts good jobs." Hill told Miller that Watson had "pitched him on the bill" and that he was "on board." Hill promised Miller he would "take the lead and round up the troops." Hill and his staff then left for the airport. The subject of contributions was not raised.

On June 10, 1988, Hill's office received a telephone call from Shahabian. Shahabian wanted to set up another meeting between Hill and Miller. When informed that nothing had changed regarding the bill, Hill stated he saw no reason to meet with Miller again.

Shahabian then contacted Karin Watson and sought her advice on how to convince Hill to meet with Miller again. Shahabian told Watson that Miller "likes to meet with politicians" and was "building a reputation in California" and wanted "to come away with relationships." Watson replied that Hill "would like an honorarium" and would meet with Miller if he offered him an honorarium for the meeting.[2]

Afterwards, Watson approached Hill's office and scheduled a meeting between Hill and Miller for which Hill would be paid an honorarium. The meeting was scheduled to take place in Miller's hotel suite at the Hyatt Hotel. According to Watson, she told Hill that the purpose of the meeting was "[t]o go over, meet George Miller, and pick up

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[2] Watson based her belief that "Hill would like an honorarium" on rumors she had heard during a staff meeting in Tahoe. There was no evidence that she discussed this proposal with Hill or that Hill had asked her to seek a payment for him. In 1988 the payment of honoraria to state elected officials was legal in California if reported to the Fair Political Practices Commission. They have since been banned by statute.

the honorarium."[3] Hill testified Watson told him that the meeting would be with Miller and a group of businessmen associated with him, and that right before the meeting she told him the other businessmen would not attend because their plane had been delayed. Watson denied making these statements.

Watson walked over with Hill to the meeting at the Hyatt Hotel. She briefed Hill about the status of AB 4203 and "what we had agreed to do" in support of the bill.

The meeting amongst Hill, Watson, and Miller lasted approximately sixty minutes. Their conversations were primarily social and unrelated to the bill. They briefly discussed AB 4203. Hill reiterated that the problem with the bill was in the Governor's office and promised to ask Ken Maddy, the GOP minority leader in the Senate, to carry the bill on the Senate floor because this would reduce the likelihood of a veto. Hill and Watson explained to Miller that the bill was a natural one for Republicans to support:

> KW: . . . We had, we had no policy problem with the bill ever. I, I think I pointed that out at our very first meeting.
>
> GM: Right.
>
> KW: It's the kind of bill we would automatically support. It's the kind of thing we would wanna do and make and make your ability to do business here in California ah, you know, doable.

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[3] She later testified that she told Hill "the reason . . . we were going is to pick up this honorarium check, and the sponsor of the bill wanted to meet him personally . . . instead of just sending it over. . . . [Hill] was perfectly willing to go."

. . . .

FH: George, we believe in free enterprise. That's the problem.

GM: Yeah, its amazing how many people don't appear to believe in free enterprise though.

FH: A lot of people just flat out don't.

As the meeting came to a close, Miller handed Hill a $2,500 check and the following exchange occurred:

FH: Appreciate all your help. Thanks. (IA) [Hill handed check by Murray] That for me? Good for you guys.

GM: Karin did a good job.

FH: She did do a good job.

GM: Be sure you count it all.

FH: We will.

GM: Okay.

FH: Appreciate the help.

GM: Anything else you need. . . .

FH: Well, I have a good reading, we'll talk to ah, we have Maddy at breakfast tomorrow and we'll see how that goes okay, and ah Pat [Nolan] also told me today on the floor he wanted [sic] to mention this to the Governor at lunch. . . .

GM: Okay, that was gonna be my question just to be sure that the Governor's happy with us and I'm sure you can handle that.

The next day, Watson spoke with Shahabian, telling him that she was relieved because "I was afraid he [Miller] would talk to Frank about money and it just is, he handled it fine and he didn't."

Shortly thereafter Miller telephoned Hill. Hill reported that he had had "a nice chat" with the Governor's chief of staff and had talked to Senator Maddy about carrying the bill on the Senate floor. Miller stated: "I wanted to tell you that if there's any need for it, I can certainly increase what I gave you last night with no problem at all." Hill quickly rejected the offer: "Oh no, no. I think you've been very generous and everything's fine and we're, its a good bill and I hope that we can help you with it."

Hill called Watson almost immediately after this conversation. He explained to her what had happened and wanted to know what she knew about Miller. Watson testified that Hill also suggested that Miller might be an agent of the FBI or the state Fair Political Practices Commission. Watson assured Hill that she knew Miller, that he was legitimate, and had just misspoken.

On June 29, 1998, Hill deposited the $2,500 check in his personal bank account. The account was maintained under his own name. The proceeds were used for personal expenses. Because the check was blank, Hill had his office place the notation "Frank Hill-Honorarium" on the payee line.[4] Hill reported his receipt of the payment to the Fair

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[4] The undercover agents had intentionally left the payee line blank, to "see where it would go." Hill did not attempt to conceal his receipt of the check. Instead, he placed his name on the check

Political Practices Commission in compliance with state law and reported the proceeds as income on his tax returns.

In other developments in the FBI's sting operation, on June 4, 1991, State Senator Alan Robbins secretly agreed with the government to plead guilty to racketeering and tax evasion charges at a later date, and in the meantime to act as a federal informant in exchange for leniency at sentencing. From July until November of 1991, he engaged in hearings and deliberations as chairman of the Senate committee having jurisdiction over major legislation concerning the insurance industry in California, all the while taking positions at the direction of the FBI and the United States Attorney's Office designed to elicit bribes from Clayton Jackson, a prominent Sacramento lobbyist. Robbins retained his seat in the Senate and influenced state policy while his actions and statements were being controlled by federal agents.

The government did not return an indictment against Hill until five years later. Hill was charged with conspiracy to commit extortion and extortion under color of official right (18 U.S.C. § 1951), and with money laundering (18 U.S.C. § 1956(a)(1)(A) (1994)). Trial began on May 9, 1994, and the jury returned its verdict on June 16, 1995, finding Hill guilty on all three counts. On September 12, 1995 Hill was sentenced to a forty-eight month prison term. Hill is currently incarcerated at the Federal Prison Camp in Boron, California.

(thus creating a paper trail linking him to the payment) and reported the payment as an honorarium to the Fair Political Practices Commission (thus making the link between the payer and himself a matter of public record).

REASONS FOR GRANTING THE PETITION

A. This case raises an important and recurring issue involving the protection of State sovereignty from federal intrusion. The Framers recognized that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). At the same time, this Court has recognized that the federal government has the authority, pursuant to the Commerce Clause, to prosecute state officials under federal law for public corruption offenses. *See McCormick v. United States*, 500 U.S. 257 (1991); *Evans v. United States*, 504 U.S. 255 (1992). This case lies at the intersection of these two doctrines. This Court has never decided whether constitutional principles of federalism limit the power of the federal government to intrude into the operations and policy-making of state governments in order to investigate state officials. This issue is ripe for review.[5]

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[5] For the first time before the Ninth Circuit, the government argued that Petitioner lacks standing to raise this violation of California's sovereignty. However, this argument has been waived by the government's failure to raise it in the district court. An objection based on third party standing is directed to the prudential, rather than constitutional, element of the standing analysis. *Craig v. Boren*, 429 U.S. 190 (1976). It is too late for the government to argue that it would be imprudent for a court to hear this argument; it is well settled that prudential objections will not be heard for the first time on appeal. *Id.* at 193-94; *Board of National Resources v. Brown*, 992 F.2d 937, 946 (9th Cir. 1993) (allowing counties to contest intrusions on state sovereignty, where the federal government did not contest standing in the district court).

In fact, Petitioner is the ideal party to raise this issue; it is hard to imagine someone with better standing to contest interference by the federal government in California's legislature than someone who was a sitting state legislator at the time.

As the federal government has turned increasingly to undercover operations to investigate public corruption in state governments, it has also chosen to interfere surreptitiously in state government processes. In this case, for example, the federal government: (1) introduced sham legislation into the California legislature; (2) caused legislative staffers to waste time needlessly analyzing the merits of the bill; (3) caused both houses of the California legislature to waste time considering and voting on it; (4) compelled a sitting state legislator, as part of a secret plea agreement, to act as a federal informant; and (5) compelled a state legislative aide, as part of his immunity agreement, to be a federal informant and conduct electronic surveillance, all while simultaneously performing his duties on behalf of the state legislature. In short, the federal government directly manipulated the California legislature in order to carry on its investigation.

This sort of activity is by no means unprecedented. In numerous other cases, the government has secretly interfered with state governmental processes during undercover operations. *See, e.g., United States v. Jackson*, 61 F.3d 1386 (9th Cir. 1995); *United States v. Carpenter*, 961 F.2d

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Finally, the government's argument is premised on the notion that a small class of state officials has the sole power to object to federal intrusions on state governments. If this argument were accepted, then in a very real sense, these officials would have the ability to consent to the enlargement of Congress's powers at California's expense, a possibility inconsistent with the constitutional diffusion of powers: "the Constitution divides authority between federal and state governments for the protection of individuals [not States]. . . . State officials thus cannot consent to the enlargement of the powers of Congress . . . ." *New York v. United States*, 112 S. Ct. 2408, 2432 (1992). Permitting an aggrieved state legislator to have standing avoids this result and gives meaning to the analysis in *New York v. United States*.

824 (9th Cir. 1992); *United States v. Montoya*, 945 F.2d 1068, 1073 (9th Cir. 1988); *United States v. Archer*, 486 F.2d 670, 677 (2d Cir. 1973); *Baucom v. Martin*, 677 F.2d 1346 (11th Cir. 1982); *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985); *United States v. Blackwood*, 768 F.2d 131 (7th Cir. 1985); *United States v. Taylor*, 966 F.2d 831 (4th Cir. 1992).

While perhaps motivated by noble aims, this investigative tactic represents a serious attack on the very structure of our federal system. The States cannot be expected to fulfill their role as separate sovereign entities if the Federal government is allowed to interfere directly and surreptitiously with their governments. This Court should issue a writ of certiorari to determine whether principles of federalism countenance such a fundamental assault on the separateness of State governments.

B. This case raises an important and recurring issue regarding the meaning of this Court's holding in *McCormick v. United States*, 500 U.S. 257 (1991) that an elected official may be prosecuted for extortion under the Hobbs Act based on the receipt of contributions only on proof of an explicit agreement to exchange official action for money. This Court expressed concern that without proof of an explicit agreement, ordinary political fund-raising practices, often viewed with suspicion and distaste by the public, could too easily be construed as a crime. That is precisely what has happened here. Hill was convicted of extortion despite the fact that the bill he supported was completely uncontroversial and widely regarded as good legislation; no words of intention or agreement to exchange money for support of the bill were ever spoken to him; and the payment he received was presented and described to him as in exchange for a meeting with the contributor, not as in exchange for his official action in supporting the bill.

I. REVIEW BY THIS COURT IS APPROPRIATE BECAUSE THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH PRIOR RULINGS OF THIS COURT AND THREATENS TO PROFOUNDLY ALTER THE DELICATE FEDERAL-STATE BALANCE

This case is particularly worthy of review by this Court because the Ninth Circuit's decision, approving the manipulation of the California legislature by federal law enforcement, conflicts with a number of decisions by this Court that the federal government may not "commandeer the legislative processes of the states." *New York v. United States*, 112 S. Ct. at 2420; *see also Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981); *FERC v. Mississippi*, 456 U.S. 742, 761-62 (1982); *Coyle v. Oklahoma*, 221 U.S. 559, 565 (1911).

Moreover, this case raises constitutional issues of profound national significance. The undercover investigation in this case intruded dangerously into the very heart of California's sovereign status. Indeed, if a state cannot maintain control of its legislative process, free from federal interference, it is unclear what, if any, sovereign powers it still retains. This is a recurring practice by federal law enforcement, heightening the danger to the federal system. *See* S. Ct. R. 10.1(c) (writ of certiorari appropriate to allow this Court to decide an "important question of federal law").

This Court has long noted "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructibl[e] States." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869), *quoted in, Gregory v. Ashcroft*, 501 U.S. at 457. The benefits of this federal system are many, but "[p]erhaps the principal benefit . . . is a check on abuses of government." *Gregory v. Ashcroft*, 501 U.S. at 458. Much like the separation of powers in the federal government protects against tyranny, so the separation of powers between the States and

the Federal government "ensure[s] the protection of 'our fundamental liberties.'" *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting)).

However, the benefits of this system depend on the maintenance of "a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible." *Gregory v. Ashcroft*, 501 U.S. at 459. Thus, "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers." *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926).

In this context, the Court has long made clear that the federal government may not "'commandeer' state governments into the service of federal regulatory purposes." *New York v. United States*, 112 S. Ct. at 2428. The power of the States to set their own agendas and determine their own processes follows logically from their status as separate political units. Thus, the federal government may not compel a State to locate its capital in a particular city. *Coyle v. Oklahoma*, 221 U.S. at 565. Nor may it regulate the conduct of local elections. *Oregon v. Mitchell*, 400 U.S. 112, 124-25 (1970). Nor may it compel a state to pass laws. *New York v. United States*, 112 S. Ct. at 2429-30.

Implicit in this structure is what this Court has recently labeled "the etiquette of federalism." *United States v. Lopez*, 115 S. Ct. 1624, 1642 (1995) (Kennedy, J., concurring); *see also Evans v. United States*, 504 U.S. at 291 (Thomas, J., dissenting) (principles of federalism require narrowly construing federal legislation that intrudes on state sovereignty). The federal government must respect, in word and deed, the separateness and sovereignty of the States. When the federal government begins to treat the States as mere departments or minions, to be used in the furtherance of federal ends, this Court must step in to restore the federal-state balance.

In this case, federal agents commandeered the legislature of California by manipulating its processes, through trickery and deceit, to obtain evidence in their undercover operation. In the guise of officers of a sham corporation, federal agents introduced phony legislation on two separate occasions into the California legislature. Once introduced, unwitting state legislative employees analyzed the bills as though they were real. Unwitting state legislators in both the California Assembly and Senate considered the bills and voted on them, both in committee and on the floor. Through this subterfuge, federal agents co-opted the ability of the state legislature to set its own priorities and to ignore specious legislation.

The federal agents also coerced state officers to serve as informants in their investigation. As part of a plea bargain, the government compelled State Senator Alan Robbins to record conversations for five months, all while he retained his seat on the Senate, voted on legislation, and chaired a committee shaping important legislation. Similarly, John Shahabian, a State legislative aide, was given immunity in exchange for wearing a wire, and required to allocate a large portion of his time, while on state salary, to electronic surveillance.

In this manner, federal agents impressed state officials into federal service at a time when they owed their entire duty to the State. Just as importantly, by concealing the evidence of these officials' wrongdoing, federal agents ensured that they would maintain their positions and continue to influence state policy--all while completely beholden to federal law enforcement, who would determine whether they received leniency in sentencing.

No doubt, the government will contend that its conduct represented a small intrusion into the operations of the California legislature and was justified by the need to ferret out corrupt legislators. However, in neither the district court nor the court of appeals, did the government

suggest that there was any limit on its authority to interfere with State governments in the course of undercover operations. Nor did the Ninth Circuit suggest such a limit, in its opinion in this case. App. at 1a. This is not surprising because there is no logical stopping point for the government's power, if it is conceded that they may interfere with State governmental functions at all.

For example, while the federal government engineered a veto of its legislation here, what would have prevented it from allowing a bill to be enacted into law, if doing so would have furthered their investigation? What would have prevented the government from introducing hundreds of sham bills, in the hopes that one of them would attract the interest of the intended target, but also having the effect of hopelessly distracting the rest of the legislature? Could the federal government direct a legislator, who, like Senator Robbins, is cooperating as part of a plea agreement, to change his vote on a real bill in order to maintain his cover? If the federal government may manipulate the state legislative process, it becomes impossible to draw any coherent limit on that power.

This Court should take review to nip this dangerous precedent in the bud. As one commentator has noted, "[i]f there is any danger, it lies in the tyranny of small decisions – in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday nothing is left but a gutted shell." Laurence Tribe, *American Constitutional Law* 381 (1988).

II. THE NINTH CIRCUIT'S DECISION IS IN CONFLICT WITH THE SECOND CIRCUIT, WHICH HAS SUGGESTED, IN DICTA, THAT FEDERAL INTERFERENCE WITH STATE GOVERNMENT PROCESSES IS UNCONSTITUTIONAL

This case is also appropriate for review to resolve a latent conflict in the circuits concerning the propriety of federal interference in state governmental institutions.

Unlike the Ninth Circuit, the Second Circuit has held that an undercover operation could violate the Constitution, if it manipulated state government processes. *United States v. Archer*, 486 F.2d at 677. In that case, federal agents conducted a sting to uncover corruption in the New York City criminal justice system. A federal agent: (1) created a bogus case by having a cooperating state police officer arrest him on invented gun charges; (2) gave false information under oath concerning his identity on the police report; and (3) committed perjury before a state court and grand jury. *Id.* The Second Circuit avoided having to reverse the conviction on the grounds of interference with New York's judicial system by reversing for lack of federal jurisdiction. *Id.* at 677 ("Since we conclude reversal to be required on another ground, we leave the resolution of this difficult question for another day. We hope, however, that the lesson of this case may obviate the necessity for such a decision on our part."). Nonetheless, the court clearly conveyed its views that the federal agents had violated the Constitution:

> [T]he Government agents displayed an arrogant disregard for the sanctity of the state judicial and police processes. The investigators apparently permitted their deserved contempt for corrupt practitioners in the Queens criminal justice system to spill over into disdain for all the participants in the system -- including the police, the courts, and

> the members of the grand jury, all of whom were subjected to the Government's fabrications. While this pattern of deception may be less serious than some forms of governmental participation in crime that can be hypothesized, it is substantially more offensive than the common cases where government agents induce the sale of narcotics in order to make drug arrests.

Id. Thus, while the federal government has been warned in the Second Circuit to avoid manipulating state governments, it has been given a free hand by the other circuits which have reached this issue. The result is that States in the Second Circuit enjoy a greater protection than those in the Ninth Circuit, a result directly contrary to this Court's ruling in *Coyle v. Oklahoma*, 221 U.S. at 565, that all states are equal in their sovereign powers. Only this Court can eliminate this conflict in the circuits and restore the States to equal status.

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S DECISION, ALLOWING CONVICTIONS BASED ON MERE "WINKS AND NODS," CONFLICTS WITH THIS COURT'S DECISION THAT THE *QUID PRO QUO* MUST BE "EXPLICIT"

In *McCormick v. United States*, 500 U.S. 257, this Court recognized the need for clear proof of an illegal agreement in political corruption cases. Noting the superficial similarity between ordinary, legitimate fundraising and bribes, the Court held:

> Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. . . . Money

> is constantly being solicited on behalf of candidates . . . who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right." To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.

Id. at 272.

Accordingly, the Court held that the receipt of contributions constitutes extortion under color of official right "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." *Id.* at 273.

While giving lip service to the importance of ensuring that the *quid pro quo* be "clear and unambiguous," the Ninth Circuit has undermined the explicitness requirement by holding that a conviction can be proven with inferences from circumstantial evidence. *United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir.), *cert. denied*, 113 S. Ct. 332 (1992).

> To read *McCormick* as imposing . . . a requirement [that the illegal agreement be stated expressly] would allow officials to escape liability under the Hobbs Act with winks and nods, even when the evidence as a whole proves that there has been a meeting of the minds to exchange official action for money.

Id.

The premise of the Ninth Circuit's rule is that a broad conception of extortion is needed, in order to capture all those who use their offices corruptly. This premise is fundamentally inconsistent with this Court's holding in *McCormick* that extortion must be strictly defined, so that innocent activity is not subjected to prosecution; indeed, this Court noted that the purpose of the explicitness requirement is to define "the forbidden zone of conduct with sufficient clarity." *McCormick*, 500 U.S. at 273.

The danger that innocent political activity might form the basis of a political corruption prosecution is not speculative. For example, people give money, whether in the form of campaign contributions or speaking fees, to politicians because they support the official's actions while in office. *See United States v. Brewster*, 506 F.2d 62, 81 (D.C. 1974) ("No politician who knows the identity and business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation."). This correlation, a necessary by-product of our political system, can easily be used against the politician. A prosecutor can twist the mere acceptance of money by a politician into a crime by asking the jury to infer that the politician promised to exchange official acts for the money. This inference can be drawn even though it is equally plausible that the campaign contributions were made because of the way the politician has voted on a particular issue. Determining the causation for a politician's official

acts is often a difficult and subjective exercise. The danger that this power could be abused has long been recognized.

> Nevertheless, the opportunities for an Executive, in whose sole discretion the decision to prosecute rests . . . to claim that legislative conduct has been sold are obvious and undeniable. These opportunities, inherent in the political process as it now exists, create an enormous potential for executive control of legislative behavior by threats or suggestions of criminal prosecution . . . for supposed missteps that are difficult to define and fall close to the line of what ordinarily is considered permissible, even necessary, conduct . . . .

United States v. Brewster, 408 U.S. 501, 558-59 (1972) (White, J., dissenting).

This Court attempted to remedy this danger in *McCormick* by establishing the requirement that the illegal agreement be "explicit." This case provides an ideal vehicle for clarifying what constitutes an explicit *quid pro quo*.

IV. THE NINTH CIRCUIT UPHELD HILL'S CONVICTION ON THE BASIS OF INNOCENT STATEMENTS BY HILL AND ON A COOPERATING WITNESS' CONCLUSORY OPINIONS ABOUT HILL'S INTENT, INSTEAD OF ON DIRECT PROOF THAT HILL MADE AN EXPLICIT ILLEGAL AGREEMENT

The Ninth Circuit based its decision upholding Hill's conviction on the following analysis:

> We reject Hill's argument. Watson's testimony clearly indicates that Hill

> understood that he was receiving money in exchange for his support of the legislation. She testified that she told Hill that "we are going to be receiving $10,000 in contributions to the Republicans as a result of our help on this bill." Watson stated "Hill was taking money for the bill" and that "Hill knew that what they were doing was illegal." Hill's recorded statements to Miller belie his claim that he did not agree to accept payment in exchange for his support of the bill. Hill carefully explained to Miller everything that Hill was doing in support of the legislation. Miller testified that he understood that he was paying $2,500 to Hill in exchange for Hill's influence. The jury was entitled to believe Watson and Miller, and to discredit Hill's explanation.

App. at 4a-5a.

When carefully analyzed, it becomes clear that none of these facts constitute proof of an explicit agreement between Hill and Miller to trade official action for money. In addition to being inadmissible opinions as to Hill's state of mind, Watson's conclusory claims as a government witness that "Hill knew that what we were doing was illegal" and "Hill was taking money for the bill" furnish no evidence that Hill intended to enter an illegal agreement. Watson was unable to testify to conversations with Hill or to specific circumstances supporting her conclusion about Hill's state of mind. Nor is the undercover agent's testimony that *his* intent was to pay money for Hill's influence sufficient to prove that Hill intended to enter into an explicit agreement to sell official acts.

The Ninth Circuit finds persuasive the fact that Watson told Hill "we are going to be receiving $10,000 in contributions to the Republicans as a result of our help on

this bill." This falls far short of advising Hill that there was an extortionate agreement. In a world in which the ability to advance programs and policy positions is closely tied to raising money, and in which office holders are constantly sensitive to the need for contributions, there is nothing remarkable in the fact that an aide would advise a legislator that favorable action on a bill may result in contributions from interested parties.' *See United States v. Brewster,* 506 F.2d at 81.

Moreover, there was no evidence that Hill was advised that the honorarium was a cover for an extortion payment. Watson testified at trial that she told Hill that he would be receiving the honorarium check, not for performing official acts, but for "meet[ing] George Miller." This is consistent with the purposes relayed to her by John Shahabian, that the meeting was intended as a general social discussion, unconnected with the bill: "you know how these guys are, they like to meet with politicians . . . [Miller] feels like he's building a reputation in California . . . and he wants to come away with more than just the shrimp bills." Thus, the honorarium was not presented to Hill as a *quid pro quo* for official acts, but instead to induce Hill to attend a social meeting and develop a relationship with Miller, a purpose which is entirely legal. *United States v. Carpenter,* 961 F.2d at 827 (conditioning access on contributions is not extortion).

Strangely missing from the Ninth Circuit's opinion is reference to specific comments in the taped meetings between Hill and Miller. Proof that Hill violated the statute is not supported by the fact that he "carefully explain[ed] to Miller everything that Hill was doing in support of the legislation." Indeed, the Ninth Circuit's reliance on this innocent fact demonstrates the insidiousness of its rule. Is it not the everyday business of a legislator to discuss the status of a particular bill with a supporter? The danger of the Ninth Circuit's approach is that it turns nearly every contact between a legislator and a financial supporter into a criminal act. This eviscerates the protection *McCormick* recognized as

essential in order to insulate innocent political fund-raising from criminal prosecution. Prosecution should follow when a politician's conduct is consistent with only one conclusion, that of extortion.

As the tape-recorded comments between Hill and Miller plainly show, Miller made only one offer to pay Hill for official acts. This occurred when Miller called Hill the day after their meeting. He offered to increase the honorarium he had gave Hill the day before, if it were necessary to ensure the passage of his bill. Hill immediately refused the offer and pointed out that his support was based on the bill's merits: "No, no. I think you've been very generous and everything's fine and we're, its a good bill and I hope we can help you with it."

The Ninth Circuit held that even though the evidence was susceptible to innocent interpretations, it was still sufficient to support a conviction: "[T]he jury was entitled to believe Watson and Miller, and to discredit Hill's explanation." App. at 4a. In this way, the Ninth Circuit has read the "explicitness" requirement out of the Hobbs Act and made elected officials subject to prosecution on inferences from ambiguous evidence. If *McCormick* and the protections it provides are to retain any life, this Court must grant review in order to clarify and enforce the explicitness requirement.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Stephen D. Miller
Counsel of Record
George W. Buehler
Gina T. Saviola
Robert B. Humphreys
HOWREY & SIMON
550 South Hope Street, Suite 1400
Los Angeles, CA 90071
(213) 892-2300

Attorneys for Petitioner
FRANK C. HILL

DATED: February 26, 1996

APPENDIX

APPENDIX A

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. FRANK HILL, Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TERRY FROST, Defendant-Appellant.

C.A. No. 94-10498, C.A. No. 94-10500

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

October 17, 1995, Argued and Submitted, San Francisco, California

November 27, 1995, FILED

PRIOR HISTORY: On Appeal from the United States District Court for the Eastern District of California. D.C. No. CR-93-00198-EJG. Edward J. Garcia, District Judge, Presiding.

DISPOSITION: AFFIRMED

JUDGES: Before: SKOPIL, PREGERSON, and FERNANDEZ, Circuit Judges.

OPINION: MEMORANDUM*

This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Frank Hill, a former California state legislator, and Terry Frost, a former legislative aide, appeal their Hobbs Act convictions. Both contend that the indictment was insufficient, that there was insufficient evidence to support their convictions, and that the government's "sting" operation violated the Tenth Amendment. Frost also challenges the jury instructions, and Hill contends that the

district court erred by admitting evidence [*2] of other defendants' wrongdoing, participating improperly in the trial proceedings, and refusing to depart from the sentencing guidelines. We reject these contentions, and we affirm.

1. Sufficiency of the Indictment.

The indictment charged defendants with conspiracy to commit extortion as defined by *18 U.S.C. § 1951(b)(3)*, "by obtaining and causing to be obtained under color of official right money payments totalling $12,500 which were not lawfully due defendants. . . in connection with legislation identified [as California State Legislature Assembly Bill 4203]." Hill was also charged with extortion for obtaining "under color of official right a $2,500 payment, which payment was not due Frank C. Hill or his office "in connection with the same legislation. Both Hill and Frost challenge the mere recitation of "under color of official right" as inadequate, contending that the government's failure to allege specific "official acts" prevented them from adequately preparing a defense.

The phrase "under color of official right" appears in *18 U.S.C. § 1951(b)(2)*, where the term "extortion" is defined as "obtaining of property from another, with his consent, induced by wrongful [*3] use of actual or threatened force, violence, or fear, or under color of official right." (emphasis added). *In McCormick v. United States, 500 U.S. 257, 273, 114 L.Ed. 2d 307, 111 S.Ct. 1807 (1991)*, the Supreme Court interpreted this language to require the government to prove a quid pro quo that "the payments are made in return for an explicit promise or undertaking by the official to perform or not perform an official act."

Hill and Frost thus contend that the indictment should have alleged explicit promises or undertakings to perform or not perform official acts. The district court rejected that contention, concluding that the quid pro quo

requirement does not add a new or implied element to the Hobbs Act, but merely defines the statutory term "under color of official right." The court reasoned that it is sufficient for the government to plead the crime generally in the language of the statute and then add specific averments, such as "the date the defendant received the money, the specific amount received, and in connection with specific named legislation."

We agree with the district court. An indictment must set forth the elements of the charged offense. [*4] *United States v. Woodruff, 50 F.3d 673, 676 (9th Cir. 1995).* In this circuit, "the use of 'bare bones' information - that is one employing the statutory language alone-is quite common and entirely permissible so long as the statute sets forth fully, directly and clearly all essential elements of the crime." Id. (internal quotation omitted). "It is not necessary to plead. . . evidentiary detail." Id. (internal quotation omitted). The indictment in this case was sufficient. Accordingly, we also reject Frost's contention that the district court should have granted his request for a bill of particulars. See *United States v. Giese, 597 F.2d 1170, 1180 (9th Cir.)* (bill of particulars is not necessary when the indictment is adequate), cert. denied, *444 U.S. 979, 62 L.Ed. 2d 405, 100 S.Ct. 480 (1979).*

2. Sufficiency of the Evidence

Hill argues that the government failed to prove a quid quo pro. He contends that the evidence shows his support for the legislation long before the honorarium was arranged. Hill also relies on testimony indicating that he understood that the honorarium was payment for his attendance at the meeting. Finally, he notes that he properly [*5] reported the honorarium in compliance with state law and paid taxes on the amount.

We reject Hill's argument. Watson's testimony clearly indicates that Hill understood that he was receiving money in exchange for his support of the legislation. She testified that she told Hill that "we are going to be receiving $10,000 in contributions to the Republicans as a result of our help on this bill." Watson stated "Hill was taking money for the bill" and that "Hill knew that what they were doing was illegal." Hill's recorded statements to Miller belie his claim that he did not agree to accept payment in exchange for his support of the bill. Hill carefully explained to Miller everything that Hill was doing in support of the legislation. Miller testified that he understood that he was paying $2,500 to Hill in exchange for Hill's influence. The jury was entitled to believe Watson and Miller, and to discredit Hill's explanation.

Frost also claims that the government failed to prove that the payments were made in return for an explicit promise to perform official legislative acts. We reject that claim. Although Frost did not receive any money, there is evidence of his participation in [*6] the conspiracy to exchange money for legislative support. Frost told Shahabian that Republican assistance was available if the Republicans would "share in the spoils," a term that Frost conceded at trial meant money. Frost also spoke to Shahabian about how much money would be available, agreeing that $10,000 was "probably more than enough." Frost also admitted that he served as a "conduit," discussed the amount of money with Watson and relayed information between Shahabian and Watson. Watson testified that Frost wanted "all conversations about money to go through him. . . it was my understanding that he was protecting me, and he mentioned the possibility of a grand jury investigation, and there would be deniable culpability, and we could say we hadn't talked to each other."

Notwithstanding these statements, Frost contends that he conspired only with Shahabian who was serving as an agent or representative of Miller. He argues that he was

therefore acting only on behalf of the "victim" of the extortion rather than the "official" actors. The evidence does not support Frost's contention. Rather, his statements and actions indicate the he was acting in his capacity as a legislative [*7] aide and was seeking to maximize the amount of "contributions" from Miller in exchange for legislative support.

Frost also contends that he believed that the contributions were lawfully made by a lobbyist who sought to build relationships with legislators, and specifically, to obtain access to Republicans. See *United States v. Carpenter, 961 F.2d 824, 827 (9th Cir.)* (granting or denying access to lobbyist based on campaign contributions is not an official act within the meaning of Hobbs Act), cert. denied, *121 L.Ed. 2d 250, 113 S.Ct. 332 (1992).* The evidence amply demonstrates, however, that Frost knowingly participated in the conspiracy involving Nolan, Watson, and Hill in which Hill and Nolan unlawfully agreed to exchange official legislative assistance in return for money. A conspiracy in which there is agreement "to support legislation in return for contributions is entirely different from granting or denying access." Id. Moreover, there is no question that nonelected, nonappointed government employees, who are not empowered to vote, may nevertheless violate the Hobbs Act by improperly wielding their influence in return for payment. *United States v. Freeman, [*8] 6 F.3d 586, 593 (9th Cir. 1993)*, cert. denied, *128 L.Ed. 2d 378, 114 S.Ct. 1661 (1995).*

3. Tenth Amendment Violation

Hill and Frost claim that the government's sting operation created an unconstitutional interference with the sovereignty of California in violation of the Tenth Amendment. We reject that claim. First, there is a strong argument that Hill and Frost lack standing to assert a Tenth Amendment claim on behalf of the state. See *United States v.*

Duque, 62 F.3d 1146, 1151 (9th Cir. 1995). Second, the Tenth Amendment does not bar the federal government from enforcing federal criminal laws. See *United States v. Andaverde, 64 F.3d 1305, 1310 (9th Cir. 1995).* Finally, we have already rejected the argument that a very similar sting operation was improper government conduct. *Carpenter, 961 F.2d at 829.*

4. Jury Instructions

Frost contends that the district court erred by instructing the jury that "[a] legislator's agreement to intervene with fellow legislators or the governor to secure their support for legislation constitutes an 'official act' within the meaning of the Hobbs Act." He contends either that the jury should have decided what constitutes [*9] "official acts" or, assuming that the court was justified in defining "official acts," its instruction was vague and incomplete.

We conclude that the district court properly instructed the jury. The court did not direct the jury to find that Frost committed an official act. Frost was free to argue and the jury was free to decide that the defendants in this case did not commit actions that the court defined as "official acts." Nor was the trial court's definition of official acts vague or misleading. In *Carpenter, 961 F.2d at 827*, we observed that "agreeing to vote for or against legislation in exchange for a contribution clearly falls within the ambit of the Hobbs Act, for voting is a legislator's quintessential 'official act.' Likewise, agreeing to intervene with one's colleagues to secure their support for legislation involves an 'official act." (emphasis added).

Frost also complains that the evidence and the court's instructions caused a constructive amendment to the indictment. "A constructive amendment occurs when the proof at trial supports a crime other than the crime charged

in the indictment." *United States v. Molinaro, 11 F.3d 853, 861 n.17 (9th Cir. 1993),* [*10] cert. denied, *115 S.Ct. 668 (1994).* The evidence and instructions here conformed to the charges of the indictment. This is not a case where "the crime charged is substantially changed at trial, so that it is impossible to know whether the grand jury would have indicted for the crime actually proved." *United States v. Reese, 2 F.3d 870, 891 (9th Cir. 1993)* (internal quotation omitted), cert. denied, *127 L.Ed. 2d 220, 114 S.Ct. 928 (1994).*

5. Judicial Misconduct

Hill contends that he was denied a fair trial by the trial judge's participation in the trial proceedings. We disagree. "Federal judges have broad discretion in supervising trials, and their behavior during trial justifies reversal only if there is an abuse of discretion." *United States v. Laurins, 857 F.2d 529, 537 (9th Cir. 1988),* cert. denied, *492 U.S. 906, 106, L.Ed. 2d 565, 109 S.Ct. 3215 (1989).* The judicial misconduct alleged here pales in comparison to the length and complexity of the trial. Moreover, the record shows that while the trial court maintained strict control of the proceedings, its actions were applied evenhandedly.

6. Evidentiary Rulings

Hill complains that Watson's [*11] extensive testimony regarding wrongdoings by her and Nolan was extremely prejudicial and permitted the jury to convict Hill of "guilt by association." The district court noted, however, that "evidence of Watson's duties as special assistant to the Republican Caucus and its leader Nolan, and during which a portion of the time Hill supervised her work, was admitted because it was inextricably intertwined with evidence of the offenses charged." The court explained that "how Watson did her work as special assistant in maximizing contributions in connection with pending legislation constituted circumstantial evidence corroborative of her

testimony in connection with the shrimp bill." Moreover, the court reasoned that evidence of Watson's activities was relevant "in view of Hill's testimony contradicting Watson's testimony in connection with her description of her job functions." Finally, the judge concluded that Watson's testimony was "circumstantial evidence of defendant Hill's criminal knowledge." The record thus shows that the trial judge properly and carefully weighed the probative value of the evidence against its prejudicial effect.

7. Sentencing

Hill contends that the district [*12] court erred by not departing from the sentencing guidelines due to the harshness of applying U.S.S.G. §2S1.1 to his money laundering conviction. The district court elected not to depart, stating that "even if I had the discretion under this heartland argument to depart down I would not in this case." The trial court's discretionary refusal to depart from the Sentencing Guidelines is not reviewable on appeal. *United States v. Eaton, 31 F.3d 789, 792 (9th Cir. 1994).*

Hill also claims that the Guideline should not be applied to him at all because it does not cover his offense. He did not raise this issue in the district court. Therefore, he has waived it. See *United States v. Hernandez-Rodriguez, 975 F.2d 622, 628 (9th Cir. 1992).* Even if we review Hill's claim, our review is limited to plain error. *United States v. Ullyses-Salazar, 28 F.3d 932, 938 (9th Cir. 1994),* cert. denied, *115 S.Ct. 1367 (1995).* There is no plain error here. *See United States v. Olano, 123 L.Ed.2d 508, 113 S.Ct. 1770, 1777 (1993).* In fact, the offense fell within the plain meaning of section 2S1.1.

AFFIRMED.